UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

WILLETS POINT ASPHALT CORPORATION
Employer[1]

and

LOCAL 175, UNITED PLANT AND
PRODUCTION WORKERS
Petitioner[2]

Case No. 29-RC-10356

and

BUILDING, CONCRETE, EXCAVATING
AND COMMON LABORERS, LOCAL 731,
LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO
Intervenor[3]

DECISION AND DIRECTION OF ELECTION

Willets Point Asphalt Corporation (the Employer) is engaged in producing asphalt. Local 175, United Plant and Production Workers (the Petitioner) filed a petition under Section 9(c) of the National Labor Relations Act on April 21, 2005, seeking to represent certain employees of the Employer. Another union, Building, Concrete, Excavating and Common Laborers, Local 731, Laborers' International Union of North America (the Intervenor) has been the recognized collective bargaining representative of

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1 The Employer's name appears as amended at the hearing (Bd. Ex. 2).

2 The Petitioner's name appears as amended at the hearing (Bd. Ex. 2).

3 Laborers Local 731's intervention is based on its status as the recognized collective bargaining representative of the petitioned-for employees.

the petitioned-for employees. There is no dispute that the instant petition was filed within the relevant "open" period, between 90 and 60 days before the relevant collective bargaining agreements were scheduled to expire on June 30, 2005.[4][4]

The parties stipulated that the Intervenor is a labor organization as defined in Section 2(5) of the Act. However, the Intervenor declined to stipulate to the Petitioner's status as a labor organization under Section 2(5). A hearing was held on that issue before Sharon Chau, a hearing officer of the National Labor Relations Board.

As discussed in more detail below, I find that the Petitioner is a labor organization as defined in Section 2(5).

Labor organization status of Petitioner

Section 2(5) of the Act defines a labor organization as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

The Petitioner's secretary/treasurer, Richard Tomaszewski, Jr., testified that the Petitioner exists for the purpose of getting "fair contracts" to improve employees' wages, benefits, hours and other working conditions, and for representing employees in connection with grievances. Tomaszewski further testified that employees participate in

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4[4] Leonard Wholesale Meats, 136 NLRB 1000 (1962). The parties agreed that the relevant collective bargaining agreements are two multi-employer agreements between members of the General Contractors Association of New York, Inc. (GCA) and Local 1175, Laborers International Union of North America (LIUNA). The agreements cover one bargaining unit of asphalt plant workers (Board Exhibit 4) and a separate unit of asphalt plant shippers (Board Exhibit 5), both effective from July 1, 2002, to June 30, 2005. Some time after those contracts were executed in 2002, Local 1175 LIUNA merged with Local 731 LIUNA (the Intervenor herein). Although Willets Point Asphalt Corporation's attorney stated that this employer is not a member of GCA, and the record does not indicate whether Willets Point signed something like a "me-too" agreement, there seems to be no dispute that Willets Point followed the contract between GCA and Local 1175, and then recognized Local 731 after the two locals merged.

the organization by attending meetings and voting for officers. For example, employees participated in an election when Local 175 was formed two years ago. Tomaszewski conceded that Local 175 has not yet entered into any collective bargaining agreements with employers at this time.

In short, Tomaszewski's testimony establishes that the Petitioner exists for the purpose of dealing with employers concerning grievances and other terms and conditions of employment. Employees participate in the Petitioner's organization, for example, by attending meetings and participating in elections for union officers. Thus, the Petitioner clearly meets the broad definition of labor organization in Section 2(5) of the Act. *See also* Alto Plastics Mfg. Corp., 136 NLRB 850 (1962).

The Intervenor claimed that Local 175 is not a labor organization because certain of its participants were involved in a corruption scandal when they were previously employed by Local 1175, LIUNA. Specifically, in an offer of proof, the Intervenor alleged that former Local 1175 business manager, Fred Clemenza, Jr., who had embezzled money from that union and its benefit funds, was somehow involved in the formation of Local 175. However, the Hearing Officer ruled that such contentions were irrelevant to Local 175's status as a labor organization, and rejected the offer of proof. The Hearing Officer also refused to admit into evidence certain documents proffered by the Intervenor, including a LIUNA hearing officer's report regarding Fred Clemenza's misconduct (marked for identification as Intervenor Exhibit 1, to be placed in a "rejected" exhibits file). In a related case (Case No. 29-RC-10357) involving the same labor organizations and another employer,[5[5]] the Hearing Officer likewise refused to admit

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5[5] The Petitioner initially filed several petitions for employees at various asphalt and related plants, all of whom were represented by Local 731 (Case Nos. 29-RC-10352, -10354, -10355, -10356, -10357, -

other documents deemed irrelevant: an attendance sheet for a Local 175 meeting in 2003 (marked for identification in that case as Union Exhibit 1), a LIUNA document regarding a person named Charles Clemenza (marked as Union Exhibit 2) and the Petitioner's LM-4 form for 2003 (marked as Union Exhibit 3).

The Hearing Officer correctly ruled that such questions were irrelevant, and I hereby affirm her rulings. Contrary to the Intervenor's contentions, the alleged misconduct of people who may have been involved in forming the Petitioner's organization has no bearing whatsoever on whether the Petitioner is a labor organization as statutorily defined. Even if the facts alleged by the Intervenor were assumed to be true, it would not change the fact that the Petitioner exists for the purpose of dealing with employers and therefore meets Section 2(5)'s broad definition.

As the Board said in Alto Plastics, *supra*:

> [I]t must be remembered that, initially, the Board merely provides the machinery whereby the desires of the employees may be ascertained, and the employees may select a "good" labor organization, a "bad" labor organization, or no labor organization, it being presupposed that employees will intelligently exercise their right to select their bargaining representative. In order to be a labor organization under Section 2(5) of the Act, two things are required: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. If an organization fulfills these two requirements, the fact that it is an ineffectual representative, … that certain of its officers or representatives may have criminal records, that there are betrayals of the trust and confidence of the membership, or that its funds are stolen or misused, cannot affect the conclusion which the Act then compels us to reach, namely, that the organization is a labor organization within the meaning of the Act.

136 NLRB at 851-2.

10358 and -10359). At that time, the Petitioner sought a multi-employer unit, and the instant case was heard together with six other cases. In a letter dated June 15, 2005, the Petitioner later withdrew its position regarding the multi-employer unit, and indicated its willingness to proceed to elections in a separate unit for each employer. Nevertheless, the parties had agreed to use evidence from these related cases regarding the Petitioner's status as a labor organization.

Accordingly, I find that the Petitioner is a labor organization within the meaning of Section 2(5).

CONCLUSIONS AND FINDINGS

Based upon the entire record[6][6] in this proceeding, including the parties' stipulations and in accordance with the discussion above, I conclude and find as follows:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The parties stipulated that the Employer is a domestic corporation with its office and principal place of business located at 127-15 Northern Boulevard, Flushing, New York, where it is engaged in producing asphalt.[7][7] During the past year, which period represents its annual operations generally, the Employer sold asphalt and materials valued in excess of $50,000 to entities located in the State of New York, such as Tully Construction, which entities are directly engaged in interstate commerce. The Employer

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[6][6] The undersigned hereby amends the record *sua sponte* as follows:
All transcript references to Section "25" of the Act should be punctuated as Section "**2(5)**".
References to "8(s)" employees starting on p. 33 of the transcript should read "8(**f**)" employees.
The Intervenor Exhibit ("order and memorandum" re: Fred Clemenza, Jr.) should be identified as **Intervenor Exhibit 1** (not Joint Exhibit 1), and placed in a **rejected** exhibits file.

[7][7] As indicated above at fn. 5, the Petitioner initially sought a broader unit, consisting of employees employed by various asphalt plants and related employers, some of whom were parties to the GCA multi-employers contracts. During the hearing, a great deal of discussion and confusion arose, regarding whether these employers were engaged in building and construction, whether the employers' relationship with the Intervenor was based on Section 8(f) or 9(a) of the Act, and whether a multi-employer unit is possible in a construction-industry election. The Petitioner's subsequent withdrawal of its position regarding the multi-employer unit, and its expressed willingness to proceed to elections in separate units for each employer, rendered those issues moot. Nevertheless, it should be noted that employers who manufacture concrete, asphalt and other building materials are generally not considered to be engaged primarily in building and construction. Teamsters Local 83, 243 NLRB 328 (1979)(pre-cast concrete blocks); Hudson River Aggregates, Inc., 246 NLRB 192 (1979)(crushed stone), enfd. 639 F.2d 865 (2nd Cir. 1981); J.P. Sturrus Corp., 288 NLRB 668 (1988)(readi-mix concrete); Tucson Ready-Mix, Inc., 1998 WL 1985144 (ALJ decision re: asphalt, cement, sand and rock wholesaler); Teamsters Local 294 (Island Dock Lumber), 145 NLRB 484 (1963)(building materials including concrete), enfd. 342 F.2d 18 (2nd Cir. 1965).

Finally, I have administratively determined that the Petitioner has an adequate showing of interest in a separate unit of Willets Point Asphalt Corporation employees.

is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner and the Intervenor, both labor organizations, claim to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner and Intervenor contended at the hearing that the existing bargaining units, which are described in recent collective bargaining agreements between the General Contractors Association of New York (GCA) and the Intervenor's predecessor, are appropriate units for purposes of collective bargaining. One GCA agreement covers a dozen classifications of asphalt plant workers (Board Ex. 4), and the other covers asphalt plant shippers (Board Ex. 5). As noted above, it appears that this Employer followed the GCA agreement with Local 1175, although it is not a GCA member.

The Employer contended that it consistently employs only six employees in six classifications (i.e., one each): laborer, mixer, burner, shipper, maintenance man and maintenance helper, and that the unit description need not include the extraneous - Intervenor submitted any evidence that the Employer employs asphalt plant workers in any other classifications. It should be further noted that a separate, one-person unit for the shipper would not be appropriate. I hereby conclude that an appropriate bargaining unit would combine the asphalt plant workers and shipper together in one unit, specifically including the classifications which the Employer employs.

Accordingly, I hereby find that the following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time asphalt plant workers, including laborers, mixers, burners, maintenance employees, maintenance helpers and asphalt shippers employed by Willets Point Asphalt Corporation at its 127-15 Northern Boulevard, Flushing, New York facility, but excluding office clerical employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether they wish to be represented for purposes of collective bargaining by Local 175, United Plant and Production Workers, or by the Building, Concrete, Excavating and Common Laborers, Local 731, Laborers' International Union of North America, AFL-CIO, or by neither labor organization. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election

date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. North Macon Health Care Facility, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **July 13, 2005.** No extension of time to file the list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (718) 330-7579. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. Club Demonstration Services, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C.

20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **July 20, 2005.** The request may **not** be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file the above-described document electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance can also be found under "E-Gov" on the National Labor Relations Board website: www.nlrb.com.

Dated: July 6, 2005.

/S/ ALVIN BLYER

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